

**HJR 10 Compliance and
Enforcement Study
Technical Appendix**

**Prepared by the
Environmental Quality Council
January 1997**

The Montana Environmental Quality Council

The Montana Environmental Quality Council (EQC) was created in 1971 to help state agencies, the legislature, and all Montanans define and achieve “productive harmony between humans and the environment.” The Montana Environmental Policy Act sets out the statutory duties of the EQC, among them:

- gathering and providing general information on the state’s natural resource conditions and trends,
- helping state agencies understand and implement the Montana Environmental Policy Act (MEPA),
- assisting legislators and others in interpreting and updating natural resource laws, and
- **designing and completing specific studies on current and future resource issues in Montana.**

The Environmental Quality Council is bipartisan, meets 4-6 times a year, and has 17 members, including 6 state senators, 6 state representatives, 4 members of the general public and the governor’s representative.

Environmental Quality Council Members

House Members: Representative Bill Ryan, Representative Scott Orr, Representative Dick Knox, Representative Bill Tash, Representative Vicki Cocchiarella, Representative Debbie Shea

Public Members: Gregory Tollefson, Jerry Noble, Jeanne-Marie Souvigney, Jerry Sorensen

Senate Members: Senator William Crismore, Senator Lorents Grosfield, Senator Ken Mesaros, Senator Vivian Brooke, Senator Jeff Weldon, Senator Steve Doherty

Governor's Representative: Glenn Marx

EQC Staff: Todd Everts, Legislative Environmental Analyst, Martha Colhoun, Resource Policy Analyst, Larry Mitchell, Resource Policy Analyst, Kathleen Williams, Resource Policy Analyst, Maureen Theisen, Research Assistant

.....

During the 1995 Session, the legislature approved a significant reorganization of the state's natural resource agencies. As a result, division and program structures and names as well as job titles and responsibilities have changed since the initiation of this study. In order to maintain consistency throughout this document, the EQC has continued to speak of the programs as if they still existed in their original form.

Throughout the study process, the Council and staff made a point to carefully document the information provided, the issues raised, program staff responses to issues, further research done at the request of the Council, panel presentations, and general discussions. This Appendix is the compilation of what the Council and staff felt would be most useful to others and have the longest "life." Additional information from the study, however, is referenced in various sections of this Appendix and is available by request from EQC staff.

At the time that this Appendix was going to press, the EQC had requested House Bill 132, which requires the Department of Environmental Quality, the Department of Agriculture, and the Department of Natural Resources and Conservation to report certain compliance and enforcement activities to the EQC. A copy of the bill is included as Appendix C.

If you are interested in the findings and recommendations resulting from this study, see the EQC publication, the *HJR 10 Final Report to the 55th Legislature*.

GLOSSARY OF ACRONYMS

EQC staff attempted to minimize the use of acronyms in this document. However, due to space limitations and repetition in the program summaries, they do appear. Each acronym is explained and spelled out in the text of the relevant section. The following list is provided for the reader who may read excerpts of the text which may not include the explanation.

AO	Administrative Order
ARM	Administrative Rules of Montana
BER	Board of Environmental Review
BLM	United States Bureau of Land Management
BMP	Best Management Practices
BWWC	Board of Water Well Contractors
CAFO	Confined Animal Feed Operation
CERCLA	federal Comprehensive Environmental Response, Compensation and Liability Act
CECRA	state Comprehensive Environmental Cleanup and Responsibility Act
CMVG	County Motor Vehicle Graveyard
CY	Calendar Year (January 1-December 31)
DEQ	Montana Department of Environmental Quality
DFWP	Montana Department of Fish, Wildlife and Parks
DHES	Montana Department of Health and Environmental Sciences (currently the DEQ)
DNRC	Montana Department of Natural Resources and Conservation
EA	Environmental Assessment
EQC	Environmental Quality Council
EIS	Environmental Impact Statement
EPA	federal Environmental Protection Agency
FTE	Full Time Equivalent (Employee)
FFY	Federal Fiscal Year (October 1-September 30)
FY	state Fiscal Year (July 1-June 30)
HRA	Hazard Reduction Agreement
LUST	federal Leaking Underground Storage Tank Trust fund
MDA	Montana Department of Agriculture
MCA	Montana Codes Annotated (state statutes)
MAPA	Montana Administrative Procedures Act
MDOT	Montana Department of Transportation
MEPA	Montana Environmental Policy Act
MGWPCS	Montana Ground Water Pollution Control System
MMRA	state Metal Mines Reclamation Act
MOA	Memorandum of Agreement (an official working agreement between agencies)
MOU	Memorandum of Understanding (similar to a MOA)
MPDES	Montana Pollutant Discharge Elimination System
MSUMRA	Montana Strip and Underground Mine Reclamation Act
MVRD	Motor Vehicle Recycling and Disposal
MVWF	Motor Vehicle Wrecking Facility
NFIP	National Flood Insurance Program
NPL	National Priority List
NON	Notice of Noncompliance
NOV	Notice of Violation
NRIS	Natural Resource Information System

NSNC	Nonsignificant Noncomplier
OSM	federal Office of Surface Mining
PRP	Potentially Responsible Party/Person
PTRCF	Petroleum Tank Release Compensation Fund/Board (Petro-Fund/Petro-Board)
PWSA	Public Water Supply Act
RCRA	federal Resource Conservation and Recovery Act
RI	Remedial Investigation
RIT	state Resource Indemnity Trust fund
RIGWAT	state Resource Indemnity/Ground Water Assessment Trust fund (was RIT)
SMCRA	federal Surface Mine Control and Reclamation Act
SME	Small Miner Exemption
SMZ	Streamside Management Zone
SNC	Significant Noncomplier
UIC	Underground Injection Control
USFS	United States Forest Service
UST	Underground Storage Tank

SECTION 1: INTRODUCTION

Since 1993, members of the Environmental Quality Council (EQC) have heard various concerns over state agency enforcement of environmental regulations. Specific issues raised included concerns over the ability of the state to oversee proposed hazardous waste incineration, lack of or inconsistent enforcement of water quality violations, and inequity in air quality regulation.

The Council took a closer look at water quality enforcement during a 1993-94 water quality study, and devoted two meetings in 1994 to further discuss environmental compliance programs.

Based on the scope and complexity of the issues, the EQC recommended a comprehensive study of all state natural resource agencies. The 1995 Legislature agreed, passing House Joint Resolution (HJR) 10 in March 1995.

HJR 10 (see Appendix A) directs the Environmental Quality Council to review and analyze the state's enforcement and compliance framework and how it is implemented, including these factors:

- the proper balance among enforcement tools (i.e. education, penalties, etc.) in an effective and efficient enforcement program,
- other states' attempts to measure and improve compliance, and
- whether Montana's natural resource goals are consistent and appropriate and if they are being met.

The findings and recommendations of the EQC are described in the *HJR 10 Final Report* (a separate document). This *Technical Appendix* includes background materials on the process used, programs reviewed, what the Council heard from the programs and how the programs were evaluated, and other background information the Council felt might be useful to others interested in how the state's environmental and natural resources compliance and enforcement programs operate.

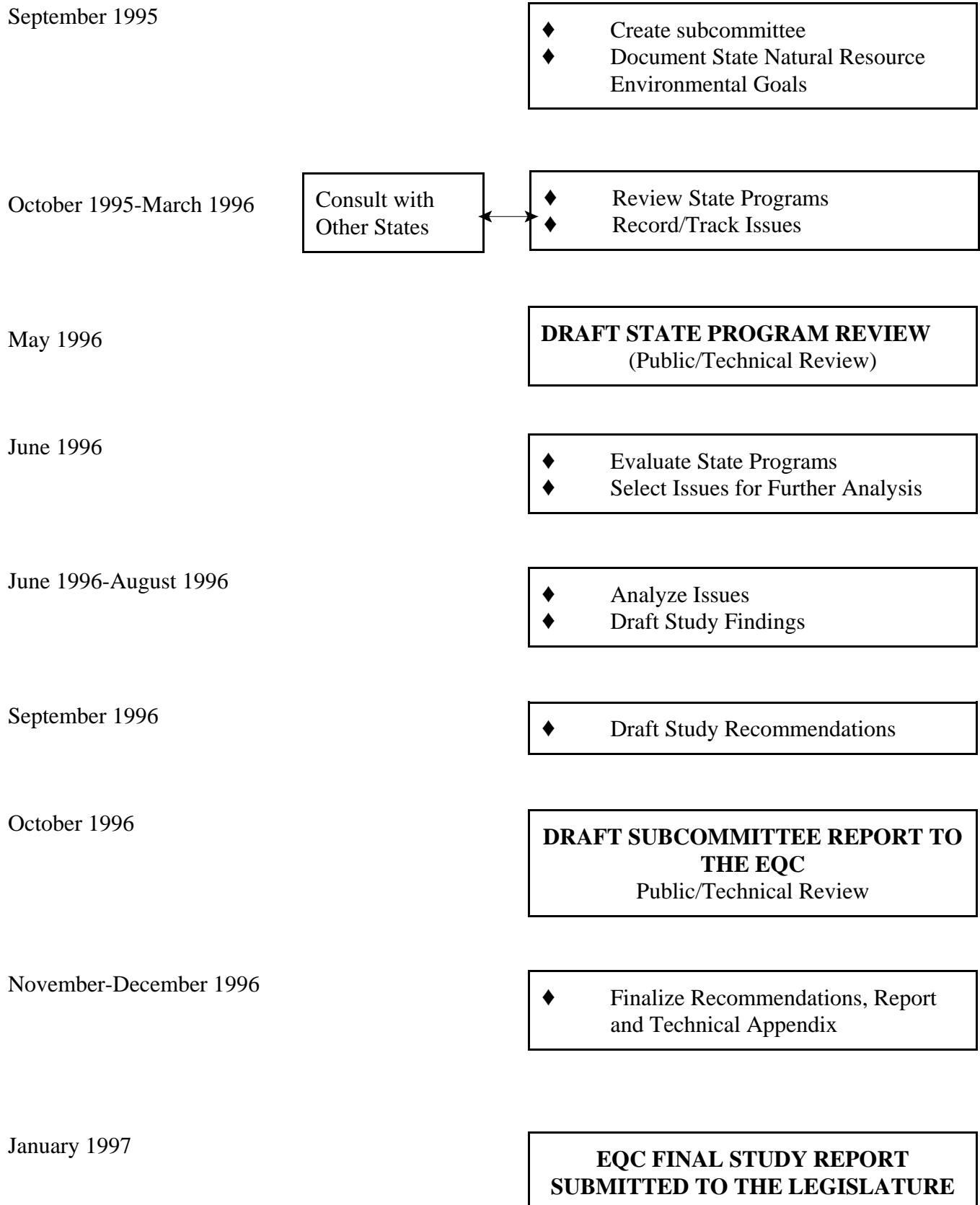
STUDY PROCESS

HJR 10 required the EQC to submit its compliance and enforcement findings and recommendations to the next legislature, which convenes in January 1997. The process and time line for the study is illustrated on the next page, and described below.

Subcommittee Creation

In September 1995, after considering its interim responsibilities and available resources, the Council decided to create a Compliance and Enforcement Study Subcommittee to address HJR 10 in depth. The subcommittee was composed of ten EQC members representing a diverse constituency, both geographically and philosophically. Members included Representative Dick Knox, Chair; Representative Vicki Cocchiarella, Vice-chair; Senator Lorents Grosfield; Representative Debbie Shea; Senator Steve Doherty; Senator William Crismore; Representative Scott Orr; Mr. Greg Tollefson; Mr. Jerry Sorenson; and Ms. Jeanne-Marie Souvigney. Between October 1995 and December 1996, the subcommittee met in Helena approximately each month, sometimes for two days, to hear and discuss topics relevant to the study.

HJR 10 STUDY PROCESS



State Program Review

The Council's most resource-intensive task was reviewing the enforcement component of each natural resource and environmental program. The EQC looked closely at 28 state programs chosen for intensive review based on objective criteria, i.e., the existence of statutory enforcement authority and a distinct regulated community. However, recognizing both staff and Council resource restrictions, some programs that met the base objective criteria were not selected for further review. More information regarding program selection is found in Section 2.

EQC staff sent each program identified for review a four-page list of written questions and a suggested presentation outline. Program personnel then appeared before the Council to present their information and answer questions. Additionally, the EQC invited representatives from relevant public interest organizations and members of the regulated communities to respond to the program presentations, to voice their concerns and opinions, and to comment on the study in general.

The EQC staff documented all issues raised in testimony by the Council or by staff and presented them in the *Draft State Program Review* sent out for public comment. Some program staff provided responses to some of these issues. The list of issues, with attached program comments, is available from the EQC staff.

Consultation with other States

One of the 1995 Legislature's requests of the Environmental Quality Council set forth in HJR 10 was that the study include an analysis of other states' natural resource and environmental agencies' attempts to improve and measure compliance and enforcement.

The Council adopted the following goal regarding this request:

Identify the methods other states use to improve and measure compliance and enforcement with their state natural resource and environmental laws.

The EQC staff contacted 13 other states in the Montana region and elsewhere to gather information, focussing on those states using a "benchmark" approach to measuring compliance. Typically, the staff contacted environmental quality agency director's offices and held discussions with directors or their policy advisors.

The staff also contacted nationwide groups such as the Environmental Council of States, National Association of Attorneys General, Environmental Law Institute, Council of State Governments, National Council of State Legislatures, Conference of Western Attorneys General, Florida Center for Public Management, and the federal Environmental Protection Agency.

The EQC staff made a presentation to the Council in January 1996 summarizing research on this item. A detailed discussion of the results of this research is included in Section 3. A brief synopsis follows.

A search for a universal "thermometer" or yardstick proved fruitless. Each state had grappled with the same issues that confront Montana in evaluating natural resource and environmental programs. The difficulty was especially obvious when measuring program efforts and then attempting to relate those efforts to resource or environmental quality.

The parameters commonly used as yardsticks for measuring compliance and enforcement results include:

- environmental results,
- compliance rates,
- progress in returning significant violators to compliance,
- measures of compliance monitoring,
- number of enforcement responses,
- timeliness of enforcement responses,
- monetary penalties assessed, and
- measures of technical assistance.

Draft State Program Review

The Council circulated a draft version of this *Technical Appendix*, entitled the *Draft State Program Review*, to the public and agency staff for review and comment. The draft, summarizing the Council's efforts to May 1996, included the following sections.

- Background Information on the Study and Study Process
- 28 State Program Reviews
- Other State Compliance and Enforcement Review Activities
- Federal/Montana Oversight Relationships
- Program Evaluation Criteria
- Potential Compliance and Enforcement Issues and Opportunities
- State Environmental Constitutional and Statutory Goals

The *Draft State Program Review* was more than 400 pages long, with the bulk of the document composed of the individual state program reviews. The Council requested that this document be distributed to interested persons for comment. Reviewers were asked to help determine whether the Council needed any additional information and to assist in the selection of issues for further analysis and review. Specifically, the Council asked the following.

- Is the information presented complete? What additional information, if any, should the Council review?
- Are the preliminary issues and opportunities identified appropriate?
- Which of the preliminary issues or opportunities identified are most important?
- Are there any other issues or opportunities that have not been identified that should be listed?
- Any suggestions or recommendations on how to address any of the preliminary issues or opportunities that have been identified?
- Are there additional uses for the information that has been generated, other than the HJR 10 study process?

The EQC received 17 sets of comments on the draft. EQC staff summarized the comments and presented them at the June subcommittee meeting.

Program Evaluation

Using the information provided in the program summaries and the evaluation forms included with this document (see Section 5), the Council completed its program evaluations, using the following five conceptual criteria.

Timeliness -- *Happening or done at an appropriate time, especially at such a time as to be of help or service.*

Equity -- *Fairness; impartiality; justice.*

Consistency -- *Agreement with what has already been done or expressed; conformity with previous practice.*

Effectiveness -- *Having an effect; producing a result. Active, not merely potential or theoretical.*

Efficiency -- *Ability to produce a desired effect, product, etc., with a minimum of effort, expense, or waste.*

Additionally, the program summaries were designed to allow the Council to make an evaluation regarding the overall appropriateness of a specific program, including appropriateness . . .

By program -- *Has the program achieved a proper balance among enforcement tools to create an effective and efficient compliance program?*

Across programs -- *Are the approaches this program uses appropriately consistent with other agencies/programs, considering relative risk to public health and the environment?*

By statutory goal -- *Is the program meeting relevant statutory goals? Are the goals appropriate?*

Council members discussed the option of submitting their evaluation forms to the EQC staff for compilation. They also discussed whether they wanted their conclusions expressed by program or generally and whether to express those conclusions in numerical terms. Though the opinions of Council members varied, as a whole they concluded that each member would use their evaluation sheets as their own personal note-taking and evaluation tool and their conclusions would be expressed by criterion (rather than by program) and would not be quantitative. They did not feel it was their role in this study to rate individual programs.

Issue Selection

The Council identified areas where they needed additional information in order to begin drafting their findings and recommendations. The questions asked included:

- A. What programs would be appropriate for the use of voluntary BMPs as an enforcement tool?
- B. What state functions (in compliance and enforcement) are candidates for privatization (including contract work)?
 - What's private now? What were the criteria? Is it a success? What was the cost?
 - Check into the Governor's office efforts related to privatization;
 - Where are program personnel being lost to privatization?
- C. How can staff retention, where identified as a problem, be improved?
 - Why is there a problem? - What can be done?

- D. What are the suggestions for improving federal/state primacy relationships? (Consult with state agencies and representatives of regulated communities.)
- E. Does each agency have formal, written policies and procedures, including:
 - a. education, technical assistance and public outreach components;
- (for each component above) if not, is one needed?; if yes, is it adequate?
 - b. clear, consistent and appropriate incentives for compliance and penalties for noncompliance;
 - c. a compliance monitoring program, using measurable parameters, and based upon statutory goals; and
 - d. a procedure for comprehensive and retrievable record-keeping and tracking?
- F. How might an annual update to this study best be provided? What parameters should be included to ensure the update is useable?
- G. Review the “History of Compliance” and “History of Resolution” sections (of the *Draft State Program Review*) to see if there are holes that can be filled.
- H. For each program, in light of its statutory goal, how does the program measure success? (i.e. condition of the resource, number of violations, etc.)
- I. Do programs have enough staff?
- J. What are the impacts of reorganization on identified issues and how can those impacts be evaluated in the future (i.e. next biennium)?
- K. Is the initial interaction with a violator appropriately flexible and understanding of the conditions of the violator?

Research Issues

EQC staff pursued a number of answers to these questions over the next two months and presented the results at the August subcommittee meeting. This information is available on request.

Development of Findings and Recommendations

Based on their review of programs, issues raised, comments received, and spirited discussions, the Council submitted their individual findings (conclusions) and recommendations to the EQC staff in September. EQC staff condensed these ideas into a draft document, which was then discussed among the group, converting individual conclusions into group recommendations.

The Council strove for collective agreement in their decision making process. Members were asked at each decision point if they could “live with” the statement being discussed. If not, they were asked to suggest a change that would enable them to accept the statement. If such a change could not be accommodated, the option existed for documenting the disagreement. The process worked well, and there was no point where a “minority opinion” was necessary. The Council findings and recommendations are presented in the *HJR 10 Final Report to the 55th Legislature*.